IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 44 OF 2005

Subhash Swami Naik,
r/o. Sawantwada, Mandrem,
Tal, Pernem-Goa. ..... Appellant/Accused

V e r s u s

State of Goa. ..... Respondents

Mr. J. A. Lobo, Advocate Under/LAS for the Appellant/Accused.
Ms. Winnie Coutinho, Public Prosecutor for the State.

CORAM: N. A. BRITTO, J.

DATE: 25th January, 2007.

ORAL JUDGMENT

This appeal is by the accused, who has been convicted and sentenced under Section 376 (ii)(f) I.P.C., to undergo R.I. for ten years and to pay a fine of Rs.5,000/- in default to undergo S.I. for one year.

2. The accused was charged and tried with the allegation that on 12.04.2003, at about 19.00 hours at Sawantwada, Mandrem, Goa, the accused forcibly committed rape on the victim/Pw5, whose age was subsequently assessed radiologically to be seven years, five months. At the relevant time, the accused was about 20 years of age. The case of the accused was that he was falsely implicated. The accused stated that he was friendly with one girl and wanted to marry her and the father of the girl objected to their relationship and the father of

the girl falsely implicated him in this case. The accused did not spell out as to what relationship or connection the father of the said girl had with the father of the victim/Pw5, in this case.

3. The accused as well as the victim/Pw5, were residents of Sawantwada, Mandrem. At the relevant time, the accused was working at Reddi, in Maharashtra, and as stated by his employer Shri Naik/Pw1, the accused worked with him last on 11.04.2003 and told him that he would go to Sawantwada, Mandrem, being his native place and, accordingly, had left to his said native place for a period of eight days, on 11.04.2003, in the afternoon. Ambadas/Pw4, is the father of the victim/Pw5 and as stated by him, at the relevant time, his wife was admitted in the Urban Primary Health Centre at Pernem. The incident took place at a time when Ambadas/Pw4 had gone to the said hospital with food for his wife and the victim/Pw5 was at home at that time. As per the victim/Pw5, she was at home and so was her brother and the accused came to their house and gave Rs.20/- to her brother for purchase of snacks and sent him out of the house and then took her to a nearby field where there was grass and gave her Rs.10/- for purchasing snacks and, thereafter, removed her underwear and committed rape on her, by inserting his penis into her private part. She stated that out of Rs.10/-, she spent Rs.2/- and upon the return of her father, she narrated the incident to him. On the next morning, Ambadas/Pw4, went in search of the accused but did not find him but the accused at about 22.00 hours, returned to the house of the victim/Pw5 and tried to take her out of the house and at that time, Ambadas/Pw4, caught the

accused and the accused on seeing the neighbours ran away. On 14.04.2003, Ambadas/Pw4 went with his daughter, the victim/Pw5, to the said U.P.H.C. at Pernem where Dr. Roshan/P.w.13 was the Medical Officer and who after finding out that victim/Pw5 was brought with a history of rape, she phoned Pernem Police Station and on receiving the said information, a police jeep was sent to U.P.H.C. Pernem, and the victim/Pw5 and her father Ambadas/Pw4 were brought to the Pernem Police Station, where the complaint of Ambadas/Pw4 was recorded and registered and, thereafter, the victim/Pw5 was sent for medical examination to G.M.C., where she was examined by Dr. Sapeco/Pw3, who submitted his report-exhibit 16. The investigation officer conducted the scene of offence panchanama on 14.04.2003 and arrested the accused on the same date and also got him medically examined by same Dr. Sapeco/Pw3. The report of his examination was produced at exhibit 19. The clothes worn by the accused were attached by Head Constable Morajkar/Pw8 on 16.04.2003, in the presence of Korgaonkar/Pw6 and those of the victim/Pw5 were attached in the presence of Ratinanth/Pw7. Provisional chargesheet was filed on 11.07.2003. The vaginal swabs and slides of the victim and urethral swabs and slides of the accused taken by Dr. Sapeco/Pw3 and the clothes namely the frock and the knicker of the victim and the long pant and T-shirt of the accused were sent to C.F.S.L., Hyderabad, by letter dated 07.07.2003-exhibit 59, with a request to do DNA fingerprinting but the same were returned by the C.F.S.L. by letter dated 09.07.2003-exhibit 62, stating that the same could not be accepted as it involved the DNA examination. Thereafter, by application dated 29.10.2003-exhibit 50, permission was sought from the Court of

Sessions to obtain blood sample of the accused and the same was granted by the learned Asst. Sessions Judge, by Order exhibit-50 colly. The blood samples of the accused was taken by Dr. Sapeco/Pw3 in the presence of the Special Judicial Magistrate Shri Usgaonkar/Pw10 and sealed in latter's presence on 04.11.2003 and sent to C.D.F.D. (Centre for DNA Fingerprinting and Diagnostics), which vide its report dated 13.12.2004-exhibit Pw9/B, opined that the DNA profile of the biological fluid (semen) present on the source of exhibit B-(frock), was matching with the DNA profile of the source of exhibit A-(Mr. Subhash Swami Naik) and that the biological fluid present on the source of exhibit D-(vaginal swab) yielded only female DNA profile.

4. The prosecution examined 14 witnesses in support of its case. The accused examined none and as already stated, the case of the accused was that he was falsely implicated by the father of his girlfriend.

5. The learned Sessions Judge after considering the evidence produced by the prosecution came to the conclusion that the evidence of the victim girl which is corroborated by medical and other evidence led by the prosecution amply proved that the accused had raped her. The learned Sessions Judge in relation to the plea taken by the accused observed, and in my view rightly, that the accused had not given the name of the girl or the name of the father of the girl who was friendly with him and whose father had falsely implicated him in this crime nor the accused had stated whether Ambadas/Pw4 and the victim girl/Pw5, were friendly

or related to the said father of his girlfriend or whether they had any other reason to falsely implicate the accused in this case. The learned Sessions Judge noted and again, in my view rightly, that such a plea was not put forward by the accused in cross examination of Ambadas/Pw4 and there was no other tangible explanation for false implication by the accused.

6. The case of the prosecution is based on the evidence of the victim/Pw5 and the corroborative evidence of her father Ambadas/Pw4 and the Medical Officer Dr. Sapeco/Pw3. The case of the prosecution was also based on circumstantial evidence consisting of Ratinath/Pw7, Dr. Sapeco/Pw3, Shri Usgaonkar/Pw10, PSI Dessai/Pw11 as well as the C.D.F.D technical expert Shri Goud/Pw9. The first controversy raised on behalf of the accused is that no satisfaction was recorded by the learned Sessions Judge whether the victim/Pw5, who was about seven years of age, was able to give rational answers to the questions asked of her. It is submitted that Sessions Judge, who recorded her evidence and who passed the Judgment, is not one and the same and, therefore,in the absence of competency test being administered to the victim/Pw5, her evidence could not be accepted. In this context, reliance has been placed on the decision of ***Ratansinh v. State of Gujarat. [(2004) 1 S.C.C. 64]***.

7. In the case at hand, the learned trial Court did not administer oath to the victim/Pw5, as according to the learned trial Court, the witness did not understand about the importance of oath. However, the learned trial Court did not

try to find out whether the victim/Pw5 on account of her tender age, was able to understand the questions she was asked and was able to give rational answers to them. The learned Sessions Judge has observed that the victim/Pw5 being a child witness ought to have been posed with some general questions in order to satisfy that she could understand the nature of questions and was able to give rational answers to them. Nevertheless, the Sessions Judge has observed that the perusal of her evidence indicates that the victim/Pw5 had deposed in a straight forward manner and the answers given by her reflect the maturity of her mind. In the case of ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** (supra), the Apex Court observed that the Indian Evidence Act, 1872, does not prescribe any particular age as a determinative factor to treat a witness to be a competent one and that a child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The Apex Court has observed that the evidence of a child witness is not required to be rejected per se, but the Court, as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. The Apex Court has noted that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This

precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. On behalf of the respondent, reliance has been placed on a decision of this Court in the case of ***Jibhau Vishnu Wagh v. State of Maharashtra (1996 Cri. L.J. 803)***. In this case, this Court referred to a Division Bench decision of Allahabad High Court reported in ***1959 Cri. L. J. 796***. In that case, it was observed that, "*Although it is not necessary to have a preliminary examination, namely, voire dire, of a child witness in order to make his testimony admissible, nevertheless, such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child witness*." After referring to the said observations of the learned Division Bench, this Court held that, "*the whole of a preliminary examination is to ascertain the level of understanding of a witness. If the same can be assessed from the statement she gave in Court, failure to record a preliminary examination would have no adverse bearing on the prosecution case. On a perusal of the statement of the prosecutrix, it is implicitly clear that she was possessed of sufficient understanding. In a coherent and forthright manner, she deposed not only in her examination-in-chief but more importantly in cross examination also. Consequently, the failure to conduct her preliminary examination does not introduce a fatal flaw in the*

prosecution case. The submission that in the absence of a preliminary examination, the evidence of the victim, could not be accepted, was rejected."

8. In the case at hand, as already stated, no preliminary examination was conducted by the learned trial Court to find out whether the witness was in a position to understand the questions posed to her and give rational answers to them. Nevertheless, the evidence which has been recorded in this case gives a clear insight to her mind that she did understand the questions posed to her and answered by her and which are found recorded in her deposition and, on that count, her evidence could not be rejected. After all, all that victim/Pw5 has deposed in this case is as to who has caused her the injury and how it was caused, and that has been sufficiently corroborated by Dr. Sapeco/Pw3. Only because no questions were put to the victim to find our her understanding capacity, her evidence cannot be rejected.

9. Reverting to her evidence, she has stated that at the time of the incident, she and her brother Danappa were at home and her father had been to the hospital as her mother was hospitalised. She stated that at the time of the incident, the accused gave Rs.20/- to her brother and sent him to purchase snacks and he took her in the nearby field adjacent to the house where there was grass and gave her Rs.10/- for purchasing snacks. Then she has given the details as to how the accused committed the act on her, which have already been reproduced hereinabove. No doubt, it was recorded in her deposition that she was not in a

position to distinguish different colours shown to her nevertheless she did identify the clothes she was wearing at the time of the incident, which were shown to her namely, the frock and the knicker. Later, she did identify the frock which was shown to her which was of white and red colour and the knicker which was shown to her and which was of green colour. She also stated that she had changed the said clothes on the next day, in the morning. In my view, considering her tender age, by the mere fact that she could not tell the colour of her frock and her knicker before the same were shown to her, it could not be said that she had not identified the clothes that she was wearing. She also stated that on the next morning, she narrated about the incident to her father and her father namely Ambadas/Pw4 has confirmed this position. Ambadas/Pw4 stated that on one day during the time his wife was in the hospital, and after he returned home, his daughter, the victim/Pw5, reported to him that she was getting pain in her vagina and, therefore, he took her to the hospital and the Medical Officer advised him to take her to the Government hospital at Bambolim. He also stated that prior to her taking to the hospital, the victim had narrated to him that the accused had committed rape over her. On behalf of the accused, it is submitted that Ambadas/Pw4 had stated in his complaint-exhibit 34, that he had gone to the hospital along with his son and, therefore, his daughter and his son could not have been at home, as stated by the victim/Pw5, as well as by him. He had also stated in his cross examination that at the time of incident, Danappa, his son had accompanied him to the hospital and at the relevant time, his daughter was at home. There is no doubt that there are some conflicting statements made by Ambadas/Pw4. Nevertheless, it is to be stated that

Ambadas/Pw4 was a rustic labourer and on account of the said conflicting statements, his case in the main, that his daughter reported to him about the rape and he took her to U.P.H.C., Pernem, cannot at all be doubted, and which is otherwise confirmed by Dr. Nazareth/Pw13, as well. Otherwise, there would have been no need for him to have taken his daughter to the hospital. Further, corroboration to the evidence of the victim/Pw5 and Ambadas/Pw4, has come from the evidence of Dr. Sapeco/Pw3, who examined the victim as well as the accused and submitted their reports. Dr. Sapeco/Pw3 has stated that on the victim/Pw5 there was a healing tear at 4 O'clock position of the hymen and that the physical and genital examination revealed that there was recent forcible sexual intercourse. As far as the accused is concerned, he opined that there was nothing to suggest that the accused was incompetent. In cross examination, Dr. Sapeco/Pw3 stated that the said injury on the victim was four to five days old. He ruled out that the said injury could be caused by self infliction either by scratching or masturbation. According to him, injuries in such cases, would have been between 11 O'clock to 1 O'clock position of the hymen. In other words, the evidence of the victim/Pw5 was sufficiently corroborated not only by her father Ambadas/Pw4, to some extent but also by Dr. Nazareth/Pw13 as well as by Dr. Sapeco/Pw3 and this evidence itself was more than sufficient to prove the charge against the accused. It is difficult to accept that the victim/Pw5 or her father Ambadas/Pw4 would shield the real culprit and falsely implicate the accused, who was their neighbour. It is now well settled that the evidence of a victim of sexual assault, stands on par with evidence of an injured witness and just as an injured witness who has sustained an

injury is best witness in the sense that such a witness is least likely to exculpate the real offender, the evidence of the victim of a sex offender is entitled to great weight. It is also well settled that a conviction can be founded on the testimony of prosecutrix alone unless there are compelling reasons for seeking corroboration and corroboration as a condition for judicial reliance is not a requirement of law but of guidance of prudence. In this case, there has been corroboration forthcoming at every stage, till the victim/Pw5 was examined by Dr. Sapeco/Pw3 and the evidence of the aforesaid witnesses was itself more than sufficient to record a conviction against the accused.

10. Then there is also circumstantial evidence. As stated by the I.O./Pw14, on 14.04.2003, in the presence of Ratinath/Pw7 and Anand Kanolkar, he attached the ready made frock of red and white colour and one greenish knicker. As per Ratinath/Pw7, who was a panch witness for the said attachment at the house of Ambadas/Pw4, his wife and his daughter victim/Pw5 were present and the said PI Mapari/Pw12, had asked the father of the victim/Pw5 to show the clothes worn by her at the time of commission of offence and the father of the victim/Pw5 handed over the said clothes which were packed and sealed in their presence and a panchanama was drawn and he had signed the same. On behalf of the accused it is submitted that Ambadas/Pw4 had stated that he had handed over the clothes of the victim to the hospital and therefore the evidence of the I.O./Pw14 and Ratinath/Pw7 ought not to be accepted. However, it may be noted that Ambadas/Pw4 also stated that at the hospital where the doctor examined his

daughter, the doctor did not collect her clothes. He also stated that the Police might have collected the clothes on the 4th day of the incident. In my view it is the evidence of the I.O./Pw14 and Ratinath/Pw7 which has got to be accepted as the same is consistent. Admittedly, no mention was made on the seizure panchanama-exhibit Pw.7/A, about any stains having been seen on the said frock, the victim was wearing at the time of the incident. As per the technical expert Shri Goud/Pw9, the stains on the frock-exhibit B, were slightly visible to the naked eye. But he stated that on microscopic examination, he had found the same to be of sperm. Ratinath/Pw7 was questioned about the said stains and he stated that the said stains were of small sizes scattered but they were on the knicker and he had not seen any stains on the frock. PI Mapari/Pw12 stated that he had seen some stains on the clothes of the victim at the time of attachment of the said clothes but he could not recollect whether the said stains were on the knicker or on the frock of the victim girl. The statement of PI Mapari/Pw12 that he had seen any stains whatsoever, has got to be considered as an improvement. In fact, it was his duty as an Investigation Officer to have minutely examined the frock and knicker produced by Ambadas/Pw4 as those of the victim/Pw5 and note whether there were any stains and make a record of the same on the panchanama-exhibit Pw7/A.. Presumably, neither PI Mapari/Pw12 or Ratinath/Pw7, examined the said clothes minutely and had they done so, they would have certainly noticed the said stains which, according to the expert Shri Goud/Pw9, were slightly visible to the naked eye. However, the fact remains that the said clothes of the victim/Pw5 were duly sealed in the presence of Ratinath/Pw7 and there has been no other explanation as

to how the frock of the victim/Pw5 could have the semen of the accused unless the same came on the frock of the victim at the time of the rape. The accused tried to give an explanation to this situation, but I must say belatedly. According to the accused, as stated by him in the statement under Section 313 of the Code, while he was in the lock up, he was asked to given his sperm/semen and then he gave a sample of his sperm after he was assaulted and after he had refused to give the same. The accused has not even stated as to how the sample of his sperms was collected and how it was taken by the police or which police officer took the same. Needless to observe, such a story was not even put up in the cross examination of PI Mapari/Pw12. It is not in the case of the accused that at any time before, he had complained to any Magistrate or to the Court when he was produced or when his plea was recorded about such action on the part of the police. The learned Sessions Judge, in my view, has rightly held that this belated explanation on the part of the accused to explain the semen found on the frock of the victim, is an afterthought. The expert Shri Goud/Pw9 had clearly opined that the DNA profile of the biological fluid (semen) present on the source of exhibit B-(frock), was matching with the DNA profile of the source of exhibit A-(Mr. Subhash Swami Naik) and that opinion must be considered as the last word which proves the complicity of the accused with the `rape by him upon the victim/Pw5. The presence of semen stains on the clothes of the victim, is a piece of corroborative evidence and this has now been confirmed being that of the accused by DNA testing.

11. The evidence produced by the prosecution was cogent and reliable. The prosecution had proved its case beyond reasonable doubt against the accused. In my view, the Judgment of conviction and sentence could not be faulted. The accused has been awarded minimum sentence prescribed.

12. There is no merit in this appeal. Consequently, the same is hereby dismissed.

N. A. BRITTO, J.

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